

4 Official Opinions of the Compliance Board 178 (2005)

NOTICE REQUIREMENTS – METHOD – NOTICE LIMITED TO MEMBERS AND PERSONS WHO WERE ON A LIST, WITHOUT NOTICE TO GENERAL PUBLIC, HELD TO BE A VIOLATION - OPEN SESSION REQUIREMENT – FAILING TO PROVIDE NOTICE OF MEETINGS TO GENERAL PUBLIC, HELD TO BE A VIOLATION

December 2, 2005

Ms. Michele J. Fluss

The Open Meetings Compliance Board has considered your complaint alleging that the State Water Quality Advisory Committee (“SWQAC”) failed to give proper public notice for a series of monthly meetings from October 2004 through July 2005. The complaint also alleged that, in view of the deficient notices, the SWQAC failed to conduct these as open meetings.¹

For the reasons explained below, we conclude that, although the SWQAC distributed notices of its meetings to a list of people, it violated the Act by failing to give notice *to the general public* of its meetings. Because of this omission, the meetings were not in reality open, in violation of the public right to attend these meetings.²

¹ The complaint also alleged certain violations by the SWQAC’s Executive Subcommittee. However, in a letter dated September 8, 2005, you stated as follows: “I accept that the Executive Subcommittee is not a public body.” The Compliance Board therefore deems as withdrawn the aspects of the complaint related to the Executive Subcommittee. In addition, the complaint alleged that the SWQAC failed to make available to the public minutes of a meeting on March 4, 2005, if one in fact occurred then. The meeting notices submitted with the SWQAC’s response do not indicate that such a meeting occurred. Consequently, this aspect of the complaint is moot. Finally, a supplementary letter asked the Compliance Board to provide guidance about the meaning of the term “willfully” in the Act’s civil penalty provision, §10-511 of the State Government Article, Annotated Code of Maryland: “A member of a public body who willfully participates in a meeting ... with knowledge that the meeting is being held in violation of the provisions of this subtitle is subject to a civil penalty not to exceed \$100.” We decline to do so. This provision of the Act addresses a *court-imposed* penalty. It is not for the Compliance Board to interpret the circumstances under which the courts might act.

² The complaint observed that SWQAC “is likely violating other requirements for open meetings,” specifically those in certain federal regulations. This contention, as the complaint recognized, is beyond our jurisdiction.

I

The Notice Violation

A. Complaint and Response

The complaint, dated July 15, 2004, recounted the response of an official in the Maryland Department of the Environment to a Public Information Act request for, among other things, the notices of the SWQAC's meetings. From the response, the complainant drew the inference that the SWQAC had failed to issue public notice as required by the Open Meetings Act.

This inference was confirmed by the SWQAC's timely response to the complaint, submitted on its behalf by Assistant Attorney General Colleen Lamont. The response indicated that, for all save one of the meetings in question, the SWQAC had provided notice only to the SWQAC's members and alternates, plus other interested parties who had put their names on a notification list. (Apparently only one person had actually done so.) For one meeting, on January 7, 2005, not even this notice was given, because the SWQAC viewed this meeting as a continuation of business from the prior meeting, on December 3, 2004. The SWQAC acknowledged that "this form of notice is not adequate to allow other members of the public to become aware of an upcoming meeting."

B. Analysis and Conclusion

Notice is legally insufficient if it is limited to self-identified interested persons. This approach is not a "reasonable method," §10-506(c)(4) of the Open Meetings Act,³ because it forecloses anyone who is not on the list from learning about a meeting. While there is nothing wrong with a public body's sending individual notice about a forthcoming meeting to those who have signed up for such notice, this means of notice must be coupled with posting of a notice or another method reasonably designed to enable any other member of the public to find out about the meeting. §10-506(c). *See 3 Official Opinions of the Open Meetings Compliance Board 92 (2001) (Opinion 01-4).*⁴

³ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

⁴ For brevity's sake, we shall henceforth refer to the volumes of our prior opinions as *OMCB Opinions*.

Consequently, the SWQAC violated the notice requirements of the Act.⁵ We note with approval that, according to its response, the SWQAC has already taken corrective action, by arranging for its meeting notices to be published in a calendar issued by the Department of the Environment.

II

The Openness Violation

A. Complaint and Response

The complaint also alleged that the SWQAC violated the Act's two key provisions on openness, §§10-505 and 10-507(a): "Except as otherwise expressly provided in this subtitle, a public body shall meet in open session"; and, "Whenever the public body meets in open session, the general public is entitled to attend." The gist of this aspect of the complaint is that, because the SWQAC failed to provide notice of its meetings to the general public, those who were not already on the list were denied an opportunity to attend. As the complainant put it in a supplement to the complaint, "Given the lack of adequate notice, the SWQAC's meetings ... were in practical effect closed to the public"⁶

The response denied that the cited openness provisions of the Act were violated. The response focused on the circumstances at the time of the meetings. All except one of the meetings were held in a conference room at the Department of the Environment, and no effort was made to exclude anyone who wished to observe.⁷ The only closed portion of a meeting occurred on April 1, 2005, when the Act's exception for specific personnel matters was invoked for a 15-minute closed session.

⁵ The complaint alleged that the SWQAC also violated §10-506(d), requiring a public body to "keep a notice provided under this section for at least 1 year after the date of the session." Although, as we have held, the meeting notices sent to the SWQAC's mailing list were not "provided under this section," and so cannot satisfy the literal command of the provision, the SWQAC has kept copies of the notices that it did send. Because the point of §10-506(d) is to preserve evidence of whether the Act's notice requirements were met, the SWQAC is in substantial compliance.

⁶ The complaint was supplemented by several additional letters, to which the SWQAC was afforded the opportunity to respond. The time necessitated by this additional correspondence delayed this opinion beyond the Act's norm.

⁷ The one meeting held elsewhere took place at the National Seashore Facility on Assateague Island. We express no opinion on whether this choice of site comported with the Act. *See generally* Office of the Attorney General, *Open Meetings Act Manual* 19 (5th ed. 2004). A public body's decision to hold a meeting in an out-of-the-way or inaccessible site might violate the Act's openness requirements. *See 4 OMCB Opinions* 147 (2005).

B. Analysis and Conclusion

Prior Compliance Board opinions have emphasized that a meeting must be open in practice, not merely in theory. Thus, for example, a public body may not give the impression that a meeting is over and then, after the audience has left, continue a discussion. This is a violation even if the public body claims that anyone who lingered would have been permitted to observe. *See, e.g., 1 OMCB Opinions* 162, 165 (1996) (Opinion 96-4).

The complaint contended that the SWQAC's failure to provide proper public notice similarly deprived members of the public of a realistic opportunity to attend and observe. We agree: An unannounced meeting is effectively closed to those who had no opportunity to learn that it was going to be held. *See 1 OMCB Opinions* 44 (1993) (Opinion 93-8).

We are not suggesting that any violation of the Act's notice requirements, no matter how technical, would perforce also violate the Act's openness requirement. A defect in a notice that otherwise alerts the public to a forthcoming meeting does not have a comparable effect. *See, e.g., 4 OMCB Opinions* 168 (2005) (omission of meeting time). But an unannounced meeting, or one announced only to a select few, is not open. Consequently, the SWQAC violated §§10-505 and 10-507(a).

OPEN MEETINGS COMPLIANCE BOARD

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